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THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908 — IS IT CONSTITUTIONAL?

NO court is unmindful of the gravity attending its procedure when, after argument and full consideration, it finds itself compelled to pronounce an act of the legislature violative of one or more provisions of the Constitution, and therefore not law. In such a case the opening sentences of its opinion are almost sure to declare with what reluctance it is that the court has been brought to set aside the work of a co-ordinate branch of the government. An unfeigned respect for the views of the law-maker is asserted, even though the court be unanimous, and though its conclusions be stated in no doubtful terms.

It is indeed proper and most just that a tribute of respect be thus paid to the legislature, since, no matter how convincing may be the court's exposition of the principles involved in the statute under examination, it must be remembered that the subject matter, in nearly every instance, has received the approval of a judiciary committee in each house, composed of lawyers, many of them of ability and experience. True, a bill may slip through a legislative assembly without attracting notice; but it is very rare, indeed, that a measure of doubtful constitutionality escapes the scrutiny of a certain number of members who are well grounded in the law. We may set it down as a fair presumption that an enactment found upon the statute book does not arrive there until after a competent authority has passed upon the question of its constitutionality.

In the light of these remarks our full meaning will be understood when we characterize as an extraordinary spectacle what was witnessed in the House of Representatives, at Washington, on April 6, 1908, — the passing, we mean, of a bill working a radical change in the common law liability of railroad corporations for injuries done to their employees, and involving a difficult question of constitutional power on the part of Congress, where the vote stood 312 yeas to 1 nay.[1] Three days later the bill, as it came from the House, passed the Senate without a division.

[1] Congressional Record, April 6, 1908, 4557. The negative vote was that of Mr. Littlefield, of Maine. Had Mr. Bannon, of Ohio, been present, he would have voted with Mr. Littlefield, since he had joined with that gentleman in signing a minority report from the Judiciary Committee, which held the bill, as reported by the majority of that committee, to be unconstitutional.

This is not the place to bring forward (much less to discuss) a question of supposed political expediency in legislation. Upon the floor of the House and of the Senate objection was made to this measure as being fundamentally unsound, and beyond the power of Congress to enact. We propose to consider briefly whether Congress has the power under the interstate commerce clause of the Constitution to enact an employers' liability statute for interstate common carriers.

The majority report from the House Judiciary Committee sets forth reasons why the bill should pass, as being a more enlightened and humane dealing with the rights of an employee, and more in harmony with the advanced views that have of recent years found expression in the legislation of England and the Continent as well as in that of many of the states of the Union. The report does not discuss the question of constitutionality. A majority of the committee appears to have assumed that the decision of the Supreme Court of the United States in what is known as the Employers' Liability Cases [1] settles that question. The opinion of Mr. Justice White, together with the dissenting opinions, will be found appended to the majority report, which says: "We believe this bill meets the objections of the Supreme Court to the act of June 11, 1906, known as the Employers' Liability Act."

On the other hand, a minority of two, in a forcible statement of views, cite the Howard case and the Adair case [2] to sustain their contention that Congress has no power to regulate persons because they engage in interstate commerce; and that the power of regulation possessed by Congress "is confined solely to regulating the interstate commerce business which such persons may do."

This is not the first time that an opinion has been cited by parties on the opposite side of a controversy, each contending that the language of the court makes for him and against his adversary.

We purpose briefly to consider two questions:

1. Has Congress the power to prescribe a rule of liability, in a suit brought by an employee against his employer, for an injury received while engaged in interstate commerce?

2. Has the Supreme Court of the United States decided that this power exists in Congress?

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[1] Howard *v.* Illinois Central Railroad Co., and Brooks *v.* Southern Pacific Co., 207 U. S. 463.

[2] 208 U. S. 161.

In May, 1906, when an employers' liability bill was pending in Congress, the Hon. Lewis E. Payson, formerly a member of Congress from Illinois, and once a judge, appeared as counsel for certain railroad companies, before the Interstate Commerce Committee of the Senate, to oppose its passage. He took the position that Congress has no power to legislate upon the subject; that as to the duties and the pay under a contract for labor and service of an employee with a railroad company, the laws of the state control, and Congress has no power to interfere. In the debate upon the bill in the House Mr. Keifer, of Ohio, argued that the bill was unconstitutional for the same reason. The Supreme Court of the United States, in the Employers' Liability Cases, in January last, decided that the act of 1906 covered intrastate as well as interstate commerce; that the one kind of business could not be separated from the other, so as to save the act from being declared unconstitutional.[1] It is proper to explain that the legislation just enacted has been directed to an elimination of the intrastate feature of the act of 1906, — upon the assumption that nothing further could be needful to render the act as thus amended a constitutional exercise of the power of Congress.

While the bill was under debate in the Senate (April 9, 1908) there were ominous signs that it was conceived by some Senators to rest upon an uncertain foundation. Said Senator Foraker: "I think there is a far more important question lying behind all this legislation . . . and that is the question whether Congress has the right to regulate the relations between master and servant . . . That is a question of supreme importance . . . Because we have avoided in this legislation the point upon which the Supreme Court rested its decision in the other case, it does not follow that this legislation will be constitutional."[2] Senator Dolliver, who had charge of the bill, admitted as follows: "I do not know what the ultimate decision of the Court would be on the question, if it were presented, of the power of Congress over the relation of master and servant."[3]

The underlying principle upon which the validity of this legislation must be based is simple enough. There is little room for misconceiving the nature of the power conferred upon Congress to regulate commerce among the states, and no excuse for unduly

[1] 207 U. S. 463.
[2] Cong. Record, April 9, 1908, 4729.
[3] *Ibid.* 4728.

extending the limits of that power. The origin of this clause of the Constitution is familiar to every one who has studied at all that instrument and its history. The condition of our domestic commerce in the days of the Confederation rendered it imperative that Congress should regulate commerce among the states. Nobody questions the wisdom of that investment of power. Nobody denies that the power is plenary in Congress, to exercise it for the good of the entire country.

The purpose of lodging this great power in the hands of Congress was that there should be given to the citizen of a state a warrant of the opportunity, and the right, to pass freely from one state to another, and to take or send his merchandise across state lines, or receive commodities from other states — all after a perfectly free and unrestrained fashion. We may not too often revert to the early declared object of the commerce clause, as just stated, — the guaranteeing of a facility of intercourse and transportation across state lines. In a word, the power intrusted to Congress was designed to insure and expedite the conveyance of passengers and freight with a complete freedom and ease from one state into another.

Keeping in mind this purpose, we shall not find it difficult to fix upon a rule of construction that will tell us whether a proposed measure falls within the line limiting the power of Congress. Whatever facilitates transportation, either in respect to safety or to speed, it is obvious, forms a subject for congressional legislation. Doubt has been expressed in some quarters whether Congress enjoys the same power to *restrict* transportation that it has to facilitate it; but we need not be detained just now by a consideration of this distinction. It might lead us into the speculation whether a federal police power exists or not. Enough for our present purpose to assert that whatever acts directly upon the process of conveying persons or property over a route that extends from one state into another, may be taken up and legislated upon by Congress, as a means of regulating commerce. We are aware of no more satisfactory test of the constitutionality of a bill of this sort than to inquire whether its enactment will render the transportation of passengers or freight safer or speedier.[1]

[1] To quote from remarks made by the present writer at a hearing before the House Judiciary Committee (February 26, 1908): "It seems to me that the touchstone to be applied in legislation of this kind, at the very threshold of the inquiry, is to ask what

If the measure becomes a law, will its provisions act upon the subjects of interstate commerce in any particular so as to regulate the process of transportation? The test is a simple one. It is capable of being applied to every case as it arises; nor do we readily comprehend why the legislator should be led astray in his effort to put it into practical operation.

Let us now subject the case in hand to the test thus formulated. The act of 1908 relates to the liability of common carriers by railroad engaged in interstate commerce, where an employee is injured and brings suit against the railroad. Its provisions do away with the fellow-servant doctrine, and are to the effect that proof of contributory negligence shall not bar recovery. The jury is to reduce the damages in proportion to the amount of negligence attributable to the employee.

That the object of this change in the law is to benefit the employee will not be denied. His interest, and the interest of nobody else, appears to have been in the mind of the draftsman of the bill. The passenger, or the owner of freight, is not affected in the remotest degree by this departure from what hitherto has been the rule in most of the states. Well may the dissenting members of the House Judiciary Committee observe: "We are unable to see how interstate commerce can be impeded, obstructed, or hindered, or facilitated, promoted, or aided, either directly or indirectly, in the slightest degree in either case, because the doctrine of fellow-servant does or does not apply as a matter of liability between the employer and the employee engaged in interstate commerce."[1]

It is at this precise point that the act fails to bring itself within the proper limits of the power conferred upon Congress. We have examined the opinions of the courts below where the attempt is made to sustain the law as constitutional. We do not find that a single one points out wherein the subject of this new legislation has a direct bearing upon interstate commerce. The line of reasoning seems to be that, inasmuch as Congress has plenary power, it can act upon all the "instrumentalities" engaged in the conduct of interstate transportation. One of these "instrumentalities," it is

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is the purpose and object of the legislation. Is it to make easier, or safer, or speedier, to transport freight or carry passengers from one state to another; or, is it to regulate the conduct of the relations between employer and employee, which is an entirely distinct matter from commerce?" Hearings on H. R. 17036, Washington, Government Printing Office, 1908, p. 106.

[1] 60th Cong., 1st Sess., H. R. Report, No. 1366, p. 77.

argued, is the working force employed upon the railroad. Hence Congress has unlimited power to legislate as to the rights of this working force in respect to the labor of moving trains. It is said that an employee engaged in the business of moving a train which runs across a state line is a proper subject for Congress to legislate upon, with reference to his comfort and his safety. The Safety Appliance Act is cited in proof of the soundness of this position. But the Safety Appliance Act bore directly upon the problem of providing a safe mode of conveyance. The right to maintain a suit against his employer, we submit, has nothing whatever to do with the safety of the train or of the employee. It is but a vague and confused method of reasoning, this — to insist that because Congress can provide the means for safe and speedy transportation, it can therefore lay down the terms upon which the common carrier shall be liable in a suit brought by the employee for a personal injury, sustained while engaged in operating a train.

Congress may, if it see fit, enact a law requiring an employee to wear a uniform, to pass a test for color blindness, to possess certain prescribed qualifications as to health or education. Such requirements as these, it is conceived, have an obvious relation to the safe and speedy conduct of railroad transportation. Congress may not require employees to confine themselves strictly to a vegetable diet, or to read at sight a chapter from the Greek Testament. Why not? Simply because there is lacking in these instances a plain adaptation of the requirements to the better means of transacting business by railroad.

Mr. Justice Moody, in a dissenting opinion, argues elaborately to uphold the act of 1906 upon general principles. He says:

"... if Congress, in the exercise of its plenary power over interstate and foreign transportation, deems that the safety of that transportation would be increased by enacting that those employed in it shall have a different remedy for injuries sustained by its negligent conduct than that furnished by the laws of the states, this court cannot, without overstepping the boundary which separates the judicial from the legislative field, declare the enactment void."[2]

This amounts to arguing that Congress can do pretty much as it pleases in its exercise of power under the interstate commerce clause. All that the Supreme Court of the United States, according to this reasoning, is permitted to ascertain is, whether or not

[1] 207 U. S. 533.

Congress, when it enacted the law, supposed that it was facilitating commerce. Such, we submit, was not the view taken by Chief Justice Marshall in those memorable words so frequently quoted of late years:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[1]

"Which are plainly adapted to that end" is a qualification full of significance. It cannot be ignored. It is the duty of the Supreme Court of the United States to determine, in a case brought before them, whether the means adapted by Congress for carrying into effect the power intrusted to it by the Constitution are or are not *plainly* adapted to the legitimate end in view. We know of no justice who has dealt with this statute and pointed out how the privileges of the Employers' Liability Act do actually contribute to the safety, or even convenience, of passengers, owners of freight, or the employees of a railroad company.

We think we are not speaking dogmatically when we confess that the more closely we study this interesting question, the more firmly do we continue in the belief that Congress has no power to disturb the law of a state with respect to the conduct of suits, for injuries incurred within her borders, brought by employees against railroads engaged in interstate commerce. We find ourselves in complete accord with the criticisms advanced in argument for one of the defendants in error in the Employers' Liability Cases, as follows:

"Such legislation is not a regulation of commerce, and Congress has no more power to define the liability of common carriers, engaged in interstate commerce, to their employees than it has power to legislate upon the domestic relations of merchants engaged in interstate commerce. The argument that this act is a constitutional regulation of interstate commerce proceeds upon the fundamentally erroneous theory that Congress has power to regulate persons engaged in interstate commerce in all the relations of life,—whereas the power conferred by the Constitution is only the regulation of the commerce itself."[2]

The second question, Has the Supreme Court of the United States decided that this power exists in Congress? may be dis-

[1] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 421.

[2] 207 U. S. 479-480.

posed of in a few words. As reported in the Employers' Liability Cases,[1] the opinion of Mr. Justice White, who is speaking for the majority of the court, occupies fourteen pages. Only two pages are devoted to the inquiry whether Congress has power to enact the statute in question. Mr. Justice Peckham in a concurring opinion (with whom agree the Chief Justice and Mr. Justice Brewer) remarks:

"I concur in the proposition that as to traffic or other matters within the state, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce. As that is all it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it." [2]

It is interesting to note with what rapidity Mr. Justice White passes upon the great, underlying question of the power of Congress. "We do not think we are at liberty," he says, "to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress." [3] He proceeds with the discussion, he tells us, in order that the court may not mislead Congress and thus give rise to future contention. The result seems to be that nobody is assured whether this particular question has been decided or not.

It is a noteworthy circumstance that Mr. Justice White omits to declare it to be *necessary* to decide the point as to the underlying power of Congress. The two pages just referred to are mostly taken up with assertions that the unsoundness of a denial of the power is demonstrable. With great respect, however, to the learned justice, we are compelled to admit that after diligent search we have been unable to discover that any substantial reason has been brought forward to sustain the position that the power to enact this legislation exists in Congress.

True, the opinion does say: ". . . we fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred." [4]

But whoever seeks in this region of the opinion for a solid reason to justify a claim for the existence of the power will be disap-

[1] 207 U. S. 463–541. [2] *Ibid.* 504. [3] P. 494. [4] P. 495.

pointed. Nor is there a distinct, unequivocal announcement in terms that the court actually so decides.

The following language later along in the opinion well describes the character of the enactment. It serves likewise to engender in the reader's mind a doubt whether the writer of the opinion ought to be held to the conclusion that Congress was acting within the limits of an acknowledged authority:

"From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the states, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do, — that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce."[1]

We need not pursue the inquiry further. To our mind there seems not the least doubt that the court will in the future feel itself not to be bound by anything further, as declared in the opinion of the majority, than what the three concurring justices above named have said that it was necessary to decide. Litigants are encouraged to believe, therefore, that the fundamental question still remains open.

The scope of this article does not permit an inquiry into other grounds upon which it may be contended that the act of 1908 is unconstitutional. We may note that the negligence giving a right to bring suit is that "of any of the officers, agents, or employees of such carriers," not restricting it to such officer, etc., while engaged in the conduct of interstate-commerce business. Nor does the statute found the right upon the extra-hazardous nature of the employment. These features of the bill were commented upon by the minority of the House Judiciary Committee, in their report,[2] as affording reasons for pronouncing the bill unconstitutional. There is another ground which should be carefully examined. The act deals exclusively with "common carriers by railroad." Common carriers on the highway, by canal, and carriers generally by water, are not exposed to the liabilities named in the statute. A plau-

[1] P. 497.

[2] Printed in Congressional Record of April 6, 1908, pp. 4546, 4555.

sible argument, to say the least, may be urged to the effect that this is special class legislation, which the courts ought not to sustain.

This highly important enactment, it is to be hoped, will soon be brought before the courts, for a determination of the several difficult questions involved. The political and the sociological aspect of a mass of legislation that has recently been proposed of which this Employers' Liability Act forms a part, makes it all the more necessary that rigid scrutiny be applied to these questions of constitutional power. Our article has been confined to an inquiry into the true meaning of the term "to regulate commerce among the several states." It is an inquiry that may well challenge the attention of every lawyer who is watching the effect upon legislation of the drift of the public sentiment of the hour. May we not expect that before long the highest court in the land will interpret this grant of power from the states in terms that shall put to rest many a strange doctrine of disquiet, and in a measure restore to the business world that sense of stability which it was wont to enjoy, — that confidence which lies at the foundation of the nation's prosperity and contentment ?

Frank Warren Hackett.

WASHINGTON.